

MORRIS A. S. SWEN, Appellant, v. REPUBLIC OF LIBERIA, by and thru BOYONNOH WILSON and JENEH HENRY, Appellee.

Swen v RL et al [2000] LRSC 14; 40 LLR 138 (2000) (21 July 2000)

APPEAL FROM THE CIRCUIT COURT FOR THE FIRST JUDICIAL CIRCUIT,
CRIMINAL ASSIZES, COURT "C", MONTSERRADO COUNTY.

Heard: April 3, 2000. Decided: July 21, 2000.

1. The constitutional and statutory rights of a defendant in a criminal case are to be protected at every stage of the criminal process, from the investigatory stage to the trial stage.
2. Any evidence obtained by duress and in violation of the rights of a criminal defendant is inadmissible, and a judge commits reversible error in admitting such evidence during the trial.
3. Where the constitutional and statutory rights of a criminal defendant are not violated, it is legal and proper for the trial judge to admit into evidence the voluntary statement of confession written and signed by the defendant.
4. Fines and restitution may be employed as penalties for the commission of a crime.
5. In deciding whether to sentence an offender to imprisonment or to impose any of the alternative forms of penalties allowable under the statute, the court must apply the criteria laid down in section 50.10 of the Criminal Procedure Law.
6. The court may suspend the imposition of a prison sentence and impose a fine authorized by law, place the defendant on probation where the appropriate mechanism has been set up for that purpose, or impose a fine and grant probation.
7. A suspended sentence may be imposed only for a non-capital offense when the defendant is under the age of sixteen and when the defendant has never been convicted of a crime.
8. Where a person has been convicted of a crime, the court may deal with him without imposing a sentence of imprisonment, unless, having regard to the nature and circumstances of the crime, the history, character, and condition of the defendant, the court is of the opinion that his imprisonment is necessary for the protection of the public.
9. The court may sentence a convicted defendant to imprisonment if (a) there is undue risk that during the period of the suspended sentence the defendant will commit another crime; (b) the defendant is in need of correctional treatment that can be provided more effectively by his imprisonment; (c) imprisonment will tend to deter the commission of the same type of crime by others; or (d) the lesser sentence will depreciate the seriousness of the defendant's crime.

10. Unless restitution has been made prior to sentencing, the court shall include in the sentence an order directing the defendant to return the property or pay its value to the person wrongfully deprived thereof.

11. An order of restitution should be included in the sentence.

12. Public protection should be considered as the basis for the formulation of a sentence that withholds imprisonment of an offender, as required by law.

13. The legal authority of a judge to exercise discretion in a case is not a license to be utterly arbitrary by a disregard of the constitution or laws of the Republic.

Appellant, an employee of a local bank, was indicted, tried and convicted of the crime of theft of property. The indictment charged that the appellant, while in the employ of the bank had, without authorization, withdrawn certain sums of money from depositors accounts and converted the same to his private use. In rendering final judgment on the guilty verdict, the trial judge ordered only restitution of the amount which the appellant had allegedly taken from the depositors accounts. The appellant excepted to the judgment and announced an appeal to the Supreme Court for a final review, contending that the confession extracted from him had been under duress, that he was not advised of his constitutional rights to remain silent and to counsel, and that the restitution required of him was excessive since one of the private prosecutrixes had testified that the bank had already reimbursed the amount which the appellant was alleged to have withdrawn from the account.

In affirming the trial court's judgment, with modification, the Supreme Court rejected the several contentions advanced by the appellant. With regard to the contention that the confession made by the appellant was extracted under duress, the Court acknowledged that the Liberian Constitution and statutes do protect a criminal defendant against being subjected to duress as a means of extracting a confession from him or her, and agreed that such confessions are not only inadmissible into evidence, but also that it is a reversible error for the trial judge to allow such confession to be admitted into evidence. The Court observed, however, that the appellant had not denied that he had access to and was represented by retained counsel throughout the criminal process, from the investigatory stage, to the trial, and to the appeal of the case. The Court opined that under such circumstances, the appellant's constitutional rights cannot be said to have been violated, and that therefore it was proper and legal for the trial judge to admit the confession into evidence.

On the issue of the excessiveness of the restitution, the Court held that not only was the restitution not excessive, but also that the trial judge had erred in not imposing a far more severe penalty such as imprisonment and a fine, considering the serious nature of the offense and the public interest which the statute was designed to protect. The Court observed that the statute provided for a more rigid penalty, and it declared that the judge's failure to impose such penalty as an abuse of his discretion. On the basis of the foregoing, the Court affirmed the judgment of guilty, but it modified the same by ordering that restitution of the amount withdrawn by the appellant be made to the bank rather than to the private prosecutrix and that the appellant should serve a two-year imprisonment term

James W. Zotaa, Jr., of the Liberty Law Firm appeared for appellant Sikajipo A. Wollor of the Ministry of Justice, in association with Salie A. Sirleaf of the Henries Law Firm, appeared for appellee.

MADAM CHIEF JUSTICE SCOTT delivered the opinion of the Court.

The records before this Court reveal that Criminal Court "C" of the First Judicial Circuit of Montserrado County, Republic of Liberia, sitting in its August A. D. 1999 Term of Court heard the action:

Republic of Liberia by and thru Boyonnoh Wilson and Jeneh Henry...PLAINTIFF)

Versus)

CRIME: THEFT OF PROPERTY

Morris A. S. Swen...DEFENDANT)

The indictment alleged that the defendant, appellant herein, Morris A. S. Swen, between the period of May and December, 1998 had forged the signatures of private prosecutrixes Boyonnoh Wilson and Jeneh Henry on withdrawal slips which the said appellant had made out to third persons and had withdrawn a total amount of L\$161,000.00 from the individual accounts of the said private prosecutrixes held at the International Trust Company of Liberia, the employer of the appellant. An amount of L\$100,000.00 was withdrawn from the account of Private Prosecutrix Boyonnoh Wilson and L\$61,000.00 from the account of Private Prosecutrix Jeneh Henry.

At the call of the case for trial, the appellant announced that he waived jury trial. The prosecution then produced documentary and oral evidence, including a voluntary statement of confession signed by the appellant, witnesses, the withdrawal slips, and handwriting analysis to support the crime of theft of property against the appellant. Following the resting of evidence by the prosecution, the appellant announced that he was waiving the production of oral and documentary evidence and that he would take the stand to testify in his own behalf. Whereupon the case was submitted to the jury which found the appellant guilty of the crime of theft of property. Judgment was subsequently entered thereon confirming the verdict and requiring the appellant to make restitution of the total amount of L\$161,000.00 within one calendar year. The verdict and judgment were excepted to by the appellant and an appeal was announced to the Supreme Court.

The bill of exceptions, which was duly filed by appellant, basically complained that the voluntary statement of confession written and signed by the appellant was made in the absence of appellant's counsel and that the authorities at the Liberian National Police Headquarters had failed to advise the appellant of his constitutional right to remain silent and that anything spoken or written by him could be used against him in a court of law.

The bill of exceptions also averred that although Boyonnoh Wilson, one of the private prosecutrixes, had testified in court that of the total amount of L\$100,000.00 withdrawn from her account, \$6,000.00 was withdrawn with her knowledge and consent and that the International Trust Company of Liberia, the appellant's employer, had refunded the balance amount, yet the trial judge had proceeded to render a final judgement of guilty of theft of property and to order that the full amounts of L\$100,000.00 and L\$61,000.00 be refunded to the private prosecutrixes. The issues which have been presented for the decision of this Court

are: (1) whether or not the voluntary statement of confession signed by appellant was written and signed in violation of appellant's constitutional and statutory rights? (2) whether or not a trial judge had the authority to hand down a sentence which was less than the sentence provided for by statute for the offense of which the appellant was adjudged guilty?

To determine the first issue we shall look at the voluntary statement made by the appellant. The statement reads:

"Name Morris Swen

Address Gardnersville

Occupation: Accountant

Nationality: Liberian

Place of Birth: Sinoe County

Date of Birth: August 4, 1968

Father's Name: Joseph Swen

Mother's Name: Esther Swen

Age: 32 years

Tribe: Kru

Date of Statement: March 9, 1999

VOLUNTARY STATEMENT

The entire episode was done with the full consent of M. Emmanuel Doe who happens to be an employee of ITC. We all shared the money that was stolen. The both of us never encash any of the slips. It was Mr. Doe who introduce the idea that we engage in the acts. He always look at the account balances and tell that the account had money and that we can carry out the operation. In the second case, Mr. Doe said that he was going to talk to Lewis Cargeor, the administrator, so that we will resolve the case peacefully. Mr. Doe is aware of the transactions and received his share.

Signed: Moses Swen"

This voluntary statement is a confession by the appellant who also named a co-conspirator or accomplice. During the arguments before this Court, counsel for the appellant contended that appellant was not advised of his constitutional and statutory right to counsel and to remain silent and that anything said or written could be used as evidence against him in a court of law. Counsel for the appellee countered that from the moment Appellant Morris Swen was initially invited to the offices of the Liberian National Police, up to the appellate court, he was represented by several lawyers, at different points in time. Counsel for appellee further informed the Court that the first counsel that represented the appellant was the Law Firm of

Sherman and Sherman. This representation was followed by Brumskine and Associates, and later by the McDonald J. Krakue Law Firm which commenced the trial of the case. During the trial of the case and after the testimony of appellee's fourth witness, the Liberty Law Firm was retained as counsel for appellant. None of the foregoing information was denied by counsel for appellant, and the records support the allegation that the appellant was represented by counsel at every stage of this matter.

This Court has held in several of its opinions that the constitutional and statutory rights of a defendant in a criminal action shall be protected at every stage of the criminal process—from the investigatory stage to the trial of the case. This Court has also held that any and all evidence obtained by duress and in violation of the rights of a criminal defendant are inadmissible, and that reversible error is committed by the judge if such evidence is admitted during trial. For reliance, see *Teddaway v. Republic*, [\[1936\] LRSC 8](#); [5 LLR 126](#) (1936); *Gio et al. v. Republic*, 17LLR 681 (1966), Syl. 4 and 8; *Anderson et al. v. Republic* [\[1978\] LRSC 26](#); , [27 LLR 67](#) (1978), Syl. 5, text at 79 &. 80; *Eldine v. Republic*, [\[1978\] LRSC 30](#); [27 LLR 133](#) (1978), Syl. 4, text at 143-144.

In the instant case, the appellant has not denied that he was accompanied and/or represented by several counsels at various stages of the proceedings. This Court therefore finds that the appellant's constitutional and statutory rights were not violated and that it was legal and proper for the trial judge to admit into evidence the voluntary statement of confession written and signed by the appellant.

We shall now consider the second issue raised by appellant in his bill of exceptions. Appellant contended that after the jury had returned a verdict of guilty of theft of property against him, the trial judge confirmed the jury's verdict and rendered a sentence that appellant should make restitution in the entire amount of L\$161,000.00, even though Private Prosecutrix Boyonnoh Wilson had testified that the International Trust Company of Liberia had refunded the amount of L\$100,000.00 which was illegally withdrawn from her account. Appellant asserted that this sentence, handed down by the judge, was excessive and therefore illegal.

To resolve this issue we shall take a recourse to the Penal Law of Liberia to determine what penalty is provided for by statute for the criminal offense of theft of property. The statute reads as follows:

“§ 15.51. Theft of Property.

A person is guilty of theft if he: (a) knowingly takes, misappropriates, converts, or exercise unauthorized control over, or makes an unauthorized transfer of an interest in the property of another with the purpose of depriving the owner thereof; (b) knowingly obtains the property of another by deception or by threat with the purpose of depriving the owner thereof or purposely deprives another of his property by deception or by threat; or (c) knowingly receives, retains or disposes of property of another which has been stolen, with the purpose of depriving the owner thereof.

§ 15.54. Grading of Theft Offenses.

1. Felony of second degree. Theft under Section 15.51 through 15.53 is a felony of the second degree if the property or services stolen are of the value of \$50,000 or over or are acquired or

retained by a threat to commit a crime which is a felony of the first or second degree or to inflict serious bodily injury on the person threatened or on any other person.

§ 50.1. Definition of grades of offenses.

As used in this title:

(a) "Offense" means conduct for which a sentence of death or a term of imprisonment or a fine is authorized.

§ 50.5. Sentence to death or imprisonment for felony.

(b) For a felony of the second degree, to a definite term of imprisonment to be fixed by the court, the maximum of which shall be five years."

The foregoing provisions of the New Penal Law, approved 1976, clearly define theft of property in section 15.51. In addition, in section 15.54, and for the purposes of the facts of the case under review, theft of property is graded as "a felony of the second degree if the property or services stolen are of the value of \$50,000.00 or over..."

Chapter 50 of the New Penal Law, captioned "Authorized Disposition of Offenders" is included under the sentencing system specified by the said statute. Section 50.1(a) of the said Chapter, quoted supra, defines the term "offense", while section 50.5(1)(b) provides that in the absence of a Parole Board a court shall hand down the following sentence for a second degree felony, which we hereunder quote:

"(b) For a felony of the second degree, to a definite term of imprisonment to be fixed by the court, the maximum of which shall be five years."

Chapter 50 of the Penal Law also states that fines and restitution may be employed as penalties for commission of an offense or crime. Section 50.9, captioned "Authorized Fines: Restitution", states as follows: "1. As to individuals. Except as otherwise expressly provided, and subject to the limitation contained in paragraph 3, an individual who has been convicted of an offense may be sentenced to pay a fine which does not exceed:

(a) For a felony of the first or second degree, the commission of which has resulted in gain for the defendant, an amount double the gain realized by the defendant, but if such crime has not resulted in gain for the defendant, only sentence of imprisonment without a fine may be imposed."

This Court shall endeavor to answer the question of whether or not the sentence or penalty imposed by the trial judge in ordering the appellant to make restitution to the private prosecutrixes the full amount of L\$161,000.00 charged in the indictment, even though the International Trust Company of Liberia, the appellant's employer, had already refunded L\$100,000.00 to Private Prosecutrix Boyonnoh Wilson, is excessive punishment? This Court thinks not. In fact, the Court finds that the sentence handed down by the trial judge is not in conformity with the statute quoted hereinabove. The appropriate sentence prescribed by section 50.5(1)(b) is a term of imprisonment to be fixed by the court, not to exceed a maximum of five years.

This Court is also of the opinion, in contrast to the view asserted by the appellant, that the sentence imposed by the trial court is very lenient and does not serve the object of penalizing criminal offenders or the intent of the lawmakers that would-be offenders be effectively deterred from the commission of a criminal offense. This Court therefore resolves to decipher the basis upon which the trial court determined that the only penalty should be that the appellant make restitution of the amount of L\$161,000.00 (One Hundred Sixty-One Thousand Liberian Dollars) to the private prosecutrixes.

Section 50.5(3) of chapter 50 of the Penal Law provides the standard to be employed by the court in the formulation of a sentence to be imposed on criminal offender(s). The section 50.5(3) states:

"3. Basis for decision of court as to form of sentence.

In deciding whether to sentence an offender to imprisonment under this section or to impose one of the alternative forms of sentence allowable under section 31.1 (3) of the Criminal Procedure Law, the court shall apply the criteria stated in section 33.1 of that title and of section 50.10 of this title."

In addition, section 31.1 (3) of the Criminal Procedure Law provides, under forms of sentence for crimes generally that "[e]xcept as provided in paragraph two (2) of this section, and subject to the applicable statutory provisions, the court may suspend the imposition of the sentence of a person who has been convicted of a crime or sentence him as follows:

- (a) To pay a fine authorized by law (b) To be placed on probation.
- (c) To imprisonment for a term authorized by law
- (d) To fine and probation, or fine and imprisonment.

Until Chapters 33 (Suspension of Sentence; Probation) and 43 (Bureau of Probation and Parole), and the co-ordinate provisions of Chapter 41 (Organization of Division of Correction), no sentence of probation shall be imposed; and until that time a suspended sentence may be imposed only for a noncapital offense

- (a) When the defendant is under the age of sixteen years, or
- (b) When the defendant has never before been convicted of a crime.

The trial judge did not sentence the appellant to pay a fine, as the foregoing statute mandated him to do. The trial judge also could not and did not place appellant on probation, as required by law, since a parole board did not exist. Neither did the judge sentence the appellant to a term of imprisonment. Clearly the legal basis for the sentence handed down by the trial judge does not exist. Simply put, the sentence handed down by the trial judge has no legal basis. Perhaps this Court needs to take further recourse to the statute to ascertain whether the Court's conclusion that the sentence handed down by the judge was lenient and has no basis in law is correct. Pursuant to chapter 50, section 50.5(3), we shall examine section 33.1 of the Criminal Procedure Law, Title 2, Liberian Code of Laws Revised. The section states the criteria for withholding sentence of imprisonment and for placing the defendant on probation. It provides as follows:

(1) When imprisonment should be withheld. The court shall deal with a person who has been convicted of a crime without imposing sentence of imprisonment unless, having regard to the nature and circumstances of the crime and the history, character, and condition of the defendant, it is of the opinion that his imprisonment is necessary for protection of the public because:

There is undue risk that during the period of a suspended sentence or probation the defendant will commit another crime; or

The defendant is in need of correctional treatment that can be provided most effectively by his imprisonment; or

Imprisonment will tend to deter commission of the same type of crime by others; or

A lesser sentence will depreciate the seriousness of the defendant's crime.

We are of the opinion that section 33.1(c) & (d) should have been taken into consideration by the trial judge, which he failed to do. Further, the judge ignored the provision on restitution. What does the Penal Law say regarding restitution? Chapter 50, at section 50.9(5), subsection 5, provides: "Restitution. Unless restitution has been made prior to sentencing the court shall include in the sentence an order directing the defendant to return the property or pay its value to the person wrongfully deprived thereof ..." The language of the foregoing section mandates that an order of restitution be included in a sentence, meaning that the law requires that restitution shall be ordered in addition to other forms of punishment.

It seems clear, from the foregoing, that the trial judge did not employ the legal guidelines laid in the statutes in determining what sentence to render against appellant. Indeed, the provisions of the law on restitution caution the need for public protection to be considered as a basis for the formulation of a sentence that withholds imprisonment of an offender. This Court is of the view that the facts of this case, especially the fact that a bank employee illegally withdrew monies from the depositors' accounts held with the bank, show the commission of a very serious offense with very serious implications for the banking industry in particular, and for the Liberian economy in general. The Court fails to understand why the trial judge did not appreciate the need to ensure that the court adequately and properly performed its role to make sure that the public was protected from such criminal acts perpetrated by employees of banking institutions and that would-be offenders be effectively deterred.

The lenient sentence handed down by the trial judge trivializes the crime of theft of property and implies that the illegal withdrawal of depositors' money by employees of banking institutions is not a serious offense with grave implications.

This court cautions trial judges to understand their role in ensuring that the public good and interests are safeguarded so as to ensure that a conducive environment is maintained for individuals to exercise their rights and pursue their well being and happiness. This Court expects that judges will exercise discretion on the basis of the constitution and other laws and the dictates of a conscience grounded in a sense of justice and the fear of GOD. The legal authority of a judge in exercising discretion is not a license to be utterly arbitrary to the extent of showing a complete disregard for the constitution and other laws of this Republic.

Wherefore and in view of the foregoing, the Court holds that the judgment of the lower court is affirmed with the modification that the appellant is sentenced to two (2) years imprisonment and is further ordered to make restitution in the amount of L\$161,000.00 (One Hundred and Sixty-One Liberia Dollars) to the private prosecutrixes less the amounts refunded by the International Trust Company of Liberia. Further, all amounts refunded by the International Trust Company of Liberia to its depositors shall be refunded by the appellant to the said International Trust Company of Liberia. The Clerk is hereby ordered to send a mandate to the court below ordering the judge therein to resume jurisdiction and give effect to this opinion, as required by law. Costs are ruled against the appellant. And it is hereby so ordered.

Judgment affirmed with modification.